

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICTOR M. LUYANDA

Claimant

VS.

LOVE BOX COMPANY, INC.

Self-Insured Respondent

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Docket Nos. 1,046,326
& 1,046,327

ORDER

Claimant appealed the December 1, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Claimant requests medical treatment for alleged injuries to his knees while working for respondent. In the December 1, 2009 preliminary hearing Order, ALJ Klein denied claimant's request for treatment for his knees. The ALJ found claimant's condition did not arise out of his employment but, rather, claimant's condition was attributable to work he performed at his house.

Claimant contends his strenuous work activity for respondent, which involved pushing heavy loads, bending, walking and twisting, aggravated conditions in his knees. Claimant asserts it is more likely to believe his knee problems were aggravated much more by his work duties than by his short-term repair of pipes under his house. Claimant requests the Board to reverse the December 1, 2009 Order.

Respondent maintains the credible evidence establishes that claimant's knee injuries resulted from working in the crawl space of his house and that his work activities neither caused nor aggravated those injuries to the point of justifying an award of workers compensation benefits. Respondent contends ALJ Klein's determination that claimant's injuries did not arise out of his employment should be affirmed.

The only issue before the Board on this appeal is whether claimant's bilateral knee injuries arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

This matter is before the Board on claimant's request for review of the preliminary hearing Order issued December 1, 2009. In that Order the ALJ found and concluded that claimant's injuries did not arise out of his employment with respondent. Further, treatment for the bilateral knee injuries was denied.

Claimant worked for the respondent for approximately five years. The last three years his work consisted of operating a banding machine. This work required claimant to twist and bend his knees while pushing loads of boxes.

The first record of claimant's complaints of knee pain was October 9, 2008, when he went to see Dr. Debbie R. Gruenbacher. The doctor's notes of that visit state in pertinent part:

Pt. in today with his wife, states that he has been having pain in the R. knee, ongoing for the past 3 wks. States that he does not recall any injuries. States that he was working in the crawl space under his house for about a wk. when he noticed pain. He works as a Bender *[sic]* at Love Box, making boxes.¹

Claimant testified he had worked in his crawl space a week or so before visiting the doctor. Dr. Gruenbacher referred claimant to Dr. Chris Miller, an orthopedic specialist. Claimant first saw Dr. Miller on October 23, 2008. Dr. Miller's notes of that visit state in pertinent part:

This is a new patient, referred by Dr. Gruenbacher for both knees. He is a 54-year-old Hispanic male. He complains of both knees hurting, the right knee is worse than the left. The pain is on the medial side. It swells up. It definitely feels stiff. It is worse with any kind of stairs. Definitely, he has pain at night and with bending. He says that about a month ago, he was down his crawl space, doing some work and he has had pain since that time. He has had no previous problems with the knee.²

¹ P.H. Trans. (Nov. 19, 2009), Resp. Ex. 1.

² *Id.*, Resp. Ex. 2.

Dr. Miller's diagnosis was "[b]ilateral knee pain, torn articular cartilage and possible meniscus tearing."³ When claimant's pain did not resolve, Dr. Miller ordered an MRI. The MRI revealed bilateral knee meniscal tears with effusions. Surgery was recommended and performed in December 2008.

At the request of claimant's attorney, claimant was examined by Dr. Pedro A. Murati in August 2009. Dr. Murati opined that claimant's knee conditions were most likely the result of a work injury beginning in October 2008 while employed by respondent.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the various conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁶

Claimant contends the ALJ failed to take into account what caused the knee injuries and that ongoing aggravation of those conditions occurred at work. Claimant further argues that it is not credible to believe that the short time he was in the crawl space⁷ would

³ *Id.*

⁴ K.S.A. 2008 Supp. 44-501(a).

⁵ K.S.A. 2008 Supp. 44-508(g).

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁷ Claimant testified he was only in the crawl space for a couple of hours.

cause such extensive damage. Rather, claimant asserts it is more believable that his knee problems were aggravated by his work.

Respondent asserts the ALJ was correct in relying on claimant's contemporaneous statements made to medical providers rather than statements provided to the medical expert selected by claimant's attorney.

The ALJ's Order states in part: "The persuasive weight of the evidence is that the Claimant's condition is attributable to work he did under his house, and did not arise out of his employment."⁸

This Board Member agrees and will not disturb the ALJ's Order.

More weight is given to the contemporaneous statements made by claimant as reflected in the medical notes of Dr. Gruenbacher and Dr. Miller. In these statements, claimant only reports the activity in the crawl space as a possible cause and does not mention work as a possible cause of the injury. It is only when surgery becomes a possibility that a work-related injury is mentioned. As Dr. Murati was engaged by claimant's attorney his opinions are somewhat biased and given less weight than the contemporaneous statements of the claimant.

The claimant has failed to sustain his burden of proof.

The ALJ's Order finding claimant's condition did not arise out of his employment with respondent is affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member affirms the December 1, 2009 preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

⁸ ALJ Order (Dec. 1, 2009).

⁹ K.S.A. 44-534a.

Dated this ____ day of February, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Michael Snider, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent
Thomas Klein, Administrative Law Judge